

Rule 13, Ariz. R. Crim. P.

INDICTMENT AND INFORMATION: Rule 13.5(a), Ariz. R. Crim. P. – Amending the charging document to allege prior convictionsRevised 11/2009

The fact that the prosecutor alone can decide whether to invoke the enhanced sentences available for repeat offenders does not violate either due process or equal protection. *State v. Olsen*, 157 Ariz. 603, 607, 760 P.2d 603, 607 (App. 1988), citing *State v. Buchholz*, 139 Ariz. 303, 308, 678 P.2d 488, 493 (App. 1983). Rule 13.5(a), Ariz. R. Crim. P., allows the prosecution to amend the charging document to allege that the defendant has one or more prior convictions.

Rule 13.5(a), Rule 16.1(b), and A.R.S. § 13-703(N) [formerly § 13-604(P)] together govern amendments to allege prior convictions. Rule 13.5(a), Ariz. R. Crim. P., states:

a. Prior Convictions and Other Non-Capital Sentencing Allegations. The prosecutor may amend an indictment, information or complaint to add an allegation of one or more prior convictions or other non-capital sentencing allegations that must be found by a jury within the time limits of Rule 16.1(b).¹

The Comment to this subsection explains why the prosecutor is allowed to file such allegations after filing the initial charging document: “Because the prosecutor is often unable to obtain a rap sheet at the time the prosecution is commenced, he is given some leeway within which to add an allegation of a previous conviction to the charge.”

¹ Rule 16.1(b) generally requires that all motions be made “no later than 20 days prior to trial.”

If, “no later than 20 days prior to trial,” Rule 16.1(b), the prosecution files a motion to amend the charging document to add an allegation of one or more prior convictions, the decision to file that allegation is solely within the prosecutor’s discretion and the trial court must grant the motion to amend. If the prosecution does not file its motion to amend to allege prior convictions within the time limits imposed by Rule 16.1(b), the court must still grant the motion unless the court specifically finds that the defendant was prejudiced by the untimely filing. A.R.S. § 13-703(N) provides in part:

The court shall allow the allegation of a prior conviction at any time before the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the person was in fact prejudiced by the untimely filing and states the reasons for these findings. If the allegation of a prior conviction is filed, the state must make available to the person a copy of any material or information obtained concerning the prior conviction.

See also Rule 16.1(c), Ariz. R. Crim. P.:

c. Effect of Failure to Make Motions in Timely Manner.

Any motion, defense, objection, or request not timely raised under Rule 16.1(b) shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it.

As the Arizona Supreme Court stated in *State v. Williams*, 144 Ariz. 433, 442, 698 P.2d 689, 687 (1985), “Rule 13.5(a) only provides for the period in which the allegation of a prior conviction is solely within the discretion of the prosecutor. The trial judge has discretion to allow the allegation of a prior conviction any time prior to trial. The allegation must be made before trial,

however, and may not be alleged after the verdict is returned.” (internal citations omitted)